Office-Supreme Court, U.S.
FILED
APR 15 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

No. 1071

BOB G. SHUPE,

Petitioner,

VS.

NEW YORK CENTRAL SYSTEM,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOSEPH BARBERA,
One N. LaSalle Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

JOHN J. MILANO,
DOM J. RIZZI,
A. J. HARDIMAN,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

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Petitioner Bob G. Shupe prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above cause.

OPINION BELOW.

The opinion of the court below is reported in 339 Fed. 2d 998 and appears as an Appendix in this petition. The decision of the United States Court of Appeals was entered on January 4, 1965, and a petition for rehearing was denied on February 2, 1965.

JURISDICTION.

This is a negligence action brought under the Federal Employer's Liability Act, 45 U.S.C. Sections 51 et seq. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I.

Can a Court of Appeals overrule decisions of the Supreme Court?

II.

Can a Court of Appeals, under the guise of reversing and remanding for a new trial, enter, for all practical purposes, a judgment for defendant notwithstanding plaintiff's verdict?

STATEMENT OF THE CASE.

a) Evidence Pertaining to the Accident.

On December 19, 1962, plaintiff petitioner, who worked as a janitor in defendant's two story building, was carrying on his left shoulder a 100 pound carton of office supplies through a door controlled by an automatic closing device. (A. 31, 43, 44) For 15 or 20 weeks prior to the occurrence this closing device had been defective, causing the door to slam shut with a heavy and hard force. During this period plaintiff had reported this defective condition 4 or 5 times to his superiors. The condition was not repaired. (A. 49-50) The door slammed so hard during that period that it cracked the plaster along the framework of the door. (A. 50-51, Addt'l. A. 14—Plf's. Ex. 11) Joseph Walsh, defendant's witness, admitted that the plaster crack near the door frame could have been caused by the door slamming hard in closing. (A. 248) Mr. Walsh also admitted to prior complaints by employees of doors slamming hard because of defective door closing mechanism. In such cases emergency repairs would be made until someone from the Building Department got there. (A. 244-45) On the morning of the occurrence plaintiff opened the door with his right hand, kicked the door back with his left foot in order to get through. He didn't move fast enough and the slamming door struck the box with such force that he felt a sharp, tearing-like pain in his left shoulder. (A. 43, 45) He put the carton on the floor because of shoulder pain, rubbed his arm a few seconds and tried to pick up the carton. He lifted it up a few inches but had to drop it back on the floor because of shoulder pain. (A. 48) The accident was then reported immediately, an accident report was filled out and plaintiff was taken to one of defendant's doctors for treatment of his injured shoulder.

b) Evidence Pertaining to Plaintiff's Injuries.

Plaintiff remained under the continuous care of defendant's doctors from the occurrence date through May 17, 1962. During that period he was hospitalized three times (January 31, 1962, to February 12, 1962; March 4, 1962, to March 24, 1962, and May 9, 1962, to May 17, 1962.) The opinion of defendant's Dr. Hamilton was that plaintiff "probably suffered an injury to the supra-spinatous muscle." (A. 267) During the time he was under defendant's medical care, he was given heat treatments, physical therapy treatments, given pain medications daily, had his left arm manipulated while under a general anesthetic in order to break loose adhesions (A. 277-278), had his arm placed in a body cast for 16 days (Additional A. 8, A. 77) and was examined by Dr. James Vanderbosch a psychiatrist selected by defendant. (A. 79, 204) As a result of all this medical attention plaintiff had a "frozen" or a stiff shoulder when he left the hospital in May 1962. (A. 346) Defendant's psychiatrist concluded that as a result of his injury plaintiff was suffering from a "conversion reaction" which he defined as "a psychological reaction or a neurotic reaction in which the anxiety, which is the basis for all neuroses, is expressed on the muscular or skeletal system or the special sensory organs." (A. 205) The psychiatrist considered this a disease over which the victim has no control. (A. 216-217) Defendant's Dr. Hamilton admitted that plaintiff did not respond to these extensive treatments because "actually he had a stiff shoulder when he left the hospital." (A. 346)

Following defendant's medical treatments, plaintiff saw his family doctor, was hospitalized from May 24, 1962, to June 6, 1962, and submitted to an operation at Presbyterian-St. Luke's Hospital by Dr. Charles V. Heck an ortho-

pedic surgeon. (A. 135-136) This doctor found that the cartilage surface covering the end of the collar bone was destroyed. He removed 5/8th of an inch of the distal end of the collar bone, removed a portion of the ligaments holding the shoulder joint and also a portion of the joint lining from the shoulder blade. (A. 137-138) This doctor testified that he got a poor result from the operation, that plaintiff had extensive limitations of motion of the arm in all directions, that the condition was permanent and that further treatment would be of no help to plaintiff. (A. 144, 145, 153, 156-157) He was discharged from the hospital on June 15, 1962. The excised section of the clavicle was examined microscopically by Dr. George Haas the hospital pathologist. In his opinion the destruction found in the cartilage was "most in keeping with a post-traumatic lesion." (A. 75) In answer to a hypothetical question he testified that there was a causal connection between the shoulder injury of December 19, 1961, and the destructive lesion found in his examination. (A. 174)

On August 21, 1962, defendant's Dr. Hamilton permitted plaintiff to return to limited work because he "felt it would be both physically and emotionally good for him to be occupied, and on that basis I recommended that he go back to his duties, most of the duties of his regular occupation." (A. 296) Following his return to work Dr. Hamilton testified that plaintiff's arm got worse. (A. 297) Plaintiff worked on light duty from August 21, 1962, to June 21, 1963. He couldn't do any lifting with his left arm. The extent of his work was to keep the office desks and dining room tables wiped off. He tried to do whatever he could handle with what movement he had in his left arm. (A. 84)

c) Evidence Pertaining to the "Second Accident" of June 21, 1963.

On June 21, 1963, the general foreman sent word to plaintiff through an assistant that he wanted the office windows washed. (A. 97) Although this work required the use of a stepladder plaintiff knew he "wasn't in a position to refuse the job." (A. 97) On this point plaintiff further testified that "due to the fact that I couldn't use that one arm on the stepladder he knowed not to put me there. It's a violation of all rules. It's a danger to a man's life when he's already injured." (A. 97-98) In describing this accident plaintiff testified that he "got the stepladder and climbed to the top of it and got most of the windows down. I started to turn back off and fell off the ladder into the wash basin, *due to the fact that I couldn't use my left arm.* (A. 97) * * * I couldn't get hold of nothing. *Left hand, I couldn't get it out to hold anything.*" (A. 181)

Plaintiff injured his back as a result of the fall. (A. 98) He wore a lumbosacral corset for this injury. (Additional A. 1) On July 29, 1963, and on August 9, 1963, plaintiff was given back to work examinations by defendant's Dr. Davia. His written report to defendant included the following: Objective findings: Wearing lumbosacral corset with stays. *Motion almost completely restricted of left arm at shoulder.* Tenderness and surgical scar over left aromioclavicular joint. Had distal end of clavicle removed. Recovery Date: * * * Probably may never be able to return because of emotional problems * * * *May be able to do light sedentary work where use of the left arm is not required anytime.* (Additional A. 1-2) As a result of these findings defendant discharged plaintiff on August 21, 1963, because the examinations of Dr. Davia "resulted in his recommendation that you are disqualified as physically unfit to work." (A. 89)

Plaintiff charged defendant with negligence under the Federal Employer's Liability Act for:

(1) Failing to furnish plaintiff a reasonably safe place in which to do his work.

(2) Allowing the door in question to be worn, defective and out of repair.

(3) Failing to repair the door after it knew or in the exercise of ordinary care should have known of its defective condition.

The jury found in favor of petitioner and awarded him a verdict of One Hundred and Twenty Five Thousand ($125,000.00) Dollars.

The Appeals Court reversed and remanded because the jury verdict was "arbitrary and capricious," because of the "gross excessiveness of the verdict, combined with close or doubtful liability," and because this was an "exceptional" case.

REASONS FOR GRANTING THE WRIT.

I.

The Appeals Court, by its decision, overrules a long line of opinions by this Honorable Court holding that "*it would be an undue invasion of the jury's historic function for an Appellate Court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at conclusions opposite from the one reached by the jury.*" *Lavender* v *Kurn*, 327 U.S. 645, 652.

In that case this Court further said at page 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference."

In *Tenant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, this Court held at page 35:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judges feel that other results are more reasonable."

In *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, this Court held at page 653:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The "mood" of this Honorable Court is to insulate the factual findings of a jury from reappraisal of the evidence by an Appeals Court. 69 Harvard Law Review 1441. This mood was succinctly expressed by Mr. Justice Douglas in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U.S. 53. At pages 70-71 Mr. Justice Douglas said:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.
>
> "The historic role of the jury in performing that function (citing cases) is being restored in this important class of cases."

This view denying an invasion by Courts of Appeals into the function and province of the jury as judges of the facts has been reiterated in *Davis* v. *Baltimore & Ohio R. Co.*, ... U.S. ..... 13 L. Ed (2) 594; *Webb* v. *Illinois C. RR. Co.*, 352 U.S. 512; *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500; *Gallich* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108.

The Opinion in the case at bar completely ignores these pronouncements by this Court. No error of law forms the basis for reversal. The Opinion undertakes a reappraisal and re-evaluation of the evidence different from that made by the jury who saw and heard the witnesses. Aside from the many erroneous factual conclusions made in the Opinion, one cannot escape the impression that the Opinion reads like the brief of an ardent advocate for defendant. It fails to ascend notable heights of fairness or judicial impartiality.

The reasons for reversal were:

(1) "• • • the fact that plaintiff worked continuously for 10 months after his shoulder injury and

immediately prior to his back injury, we hold that no reasonable jury would find that plaintiff's disability from work was solely attributable to his shoulder injury." (Opinion P. 4)

(2) The amount of damages awarded was "grossly excessive." (Opinion P. 5)

(3) The verdict of the jury was "arbitrary and capricious" because "plaintiff's claim at trial that he was injured by a defective door closer is so grossly at variance with that of numerous persons with whom he came in contact after the alleged accident." (Opinion Pages 8-9)

(4) This is "one of those exceptional cases which call for a reversal." (Opinion P. 9)

Comments on Reason No. 1 for Reversal:

This statement assumes that plaintiff carried on all of his regular duties during that 10 month period. It completely ignores plaintiff's testimony that during that 10 months he did only light work and could not do any lifting with his left arm (A. 84) It completely ignores the testimony of defendant's Dr. Hamilton who admitted that during that 10 month period plaintiff's left arm got worse. (A. 297) And it completely ignores the plain language in the report of defendant's Dr. Davia who attributed plaintiff's unemployability to a) emotional problems, b) may be able to do light sedentary work where use of left arm is not fully required. (Additional A. 1-2)

The Opinion accepts defendant's contention (1) that there is no evidence that the second accident was caused, in whole or in part, from the first and that (2) as a matter of law defendant is not liable to plaintiff for loss of future wages because it was the second accident that rendered

plaintiff no longer employable as a janitor. (Opinion, P. 3) The reverse is true. In order to justify its decision the Appeals Court ignored and misinterpreted plaintiff's evidence on these points. On the question of proximate cause between plaintiff's injured arm and the second accident, here is plaintiff's testimony:

> "* * * so I got the stepladder and climbed to the top of it and got most of the windows down. I started to turn back off and fell into the wash basin, *due to the fact that I couldn't use my left arm.*" (A. 97)
>
> "I turned around to get my foot on the stepladder, and it moved. During the movement I fell. I couldn't get hold of nothing. *Left hand, I couldn't get it out to hold anything.*" (A. 181)

As to the defendant's second contention, the Appeals Court, for some strange reason, takes the position that the back injury sustained in the second accident was the event that rendered plaintiff unemployable and therefore "no reasonable juror would find that plaintiff's disability from work was solely attributable to his shoulder injury." (Opinion, P. 4) This position and statement in the Opinion does violence of the plain meaning of words in Dr. Davia's report. Under "Objective Findings" Dr. Davia observed that plaintiff was wearing a lumbosacral corset with metal stays. Nothing further is said in the report about the corset or plaintiff's back condition. No conclusion is made in the report nor can the slightest inference be raised from anything said in the report that plaintiff's back condition in any way contributed to his unemployability. There isn't a scintilla of evidence in the record showing that at the time of his back to work examinations plaintiff was in an way disabled from his back injury. Although Dr. Davia was employed by defendant, he was not produced

by defendant at the trial to testify about the contents of his report. Dr. Davia did say that plaintiff might "be able to do light sedentary work where use of the left arm was not fully required anytime." This was the physical disability that rendered plaintiff unemployable and for which plaintiff was discharged. No reasonable jury could have found otherwise. Yet the Appeals Court chose to brand the jury as unreasonable in deciding this important issue of fact in plaintiff's favor and chose to substitute its erroneous interpretation of the evidence for that of the jury.

Comments on Reason No. 2 for Reversal:

In attempting to justify its holding that plaintiff's verdict was "grossly excessive," the Opinion states (pp. 4-5) that "both parties agree that plaintiff's loss of earnings for the period of time he was unable to work *due to his shoulder injury* and his doctor and hospital expenses totaled $3,555.95." The Opinion then deducts this amount from the $125,000.00 and concludes that $121,444.05 is attributable to pain and suffering. Plaintiff agreed to no such thing. Plaintiff's position throughout all phases of this litigation has been that his unemployability was directly attributable to his shoulder injury. This is amply supported by the record. The Opinion's strange semantics and stranger mathematics are not justified by the evidence. At page 51 of plaintiff's Brief in the Appeals Court below plaintiff made the following analysis of the jury verdict:

Loss of earnings: January 31, 1962 to August 21, 1962, (six months, three weeks @ $91.40)	2467.80
Fired by defendant on June 21, 1963—off work from that date to time of trial (seven months three weeks @ $91.40)	2833.40
Presbyterian-St. Luke's Hospital bill	813.15
Dr. Heck	$200.00
Dr. Baldwin	60.00
Total losses up to time of trial	6379.35
Future loss of earnings—based on working expectancy of fifteen years to age 65 (Plaintiff's life expectancy was 31.5 years) at $91.40 per week or $4752.80 per year. This excludes promotions or wage increases which would offset a present cash value reduction of this sum	71292.00
	77671.35
Allowance for pain and suffering	47328.65
	$125000.00

To justify the Appeals Court's analysis of the verdict breakdown it would be necessary to reject the plain meaning of Dr. Davia's report, reject plaintiff's testimony and reject all of the medical evidence pertaining to plaintiff's shoulder disability.

Comments on Reason No. 3 for Reversal:

Plaintiff testified that the box he was carrying on his left shoulder was struck by the door slamming hard due to the defective door closer. The jury, who heard plaintiff testify and observed his demeanor on the stand, believed

him. The Appeals Court did not and chose to reject plaintiff's testimony and hold that plaintiff's shoulder injury "was not caused by the alleged defective door." (Opinion P. 8) In so holding, it was necessary for the Appeals Court to reject all of the corroborating evidence in the record supporting plaintiff's testimony of the accident.

As stated in the Opinion (P. 2), plaintiff testified that when he kicked the door back, he didn't get through fast enough and the door struck the box with such force that it almost knocked him to the floor. He felt a sharp pain in the left shoulder, put the box on the floor after taking two or three steps and rubbed his arm for a few seconds. He then *tried to lift the box, lifted it two or three inches off the floor and dropped it because of the pain.* Machtemes testified that plaintiff told him that as he *picked one* (a carton) *up from the floor,* he felt the pain in his shoulder. The accident report stated that while "*lifting a carton from the floor*" he felt a sudden pain in his left shoulder. Dr. Garrick's report showed that plaintiff told him that he "felt pain and 'catch' in left shoulder *while lifting 100 pound crate*, and stacking crates in piles." Dr. Hamilton testified that plaintiff told that "on one particular occasion when he was *lifting a box* he had a little more pain in shoulder than he had previously." St. Joseph Hospital: "left shoulder pain following injury to left shoulder while carrying office supplies in December 1961." (A. 364) St. Luke's Hospital: Patient claims onset ½ year ago when he traumatized (L) shoulder. (Additional A. 9)

All of this testimony corroborates plaintiff as to the last act he performed in the cycle of the accident, namely, lifting the carton from the floor. The only variance is whether plaintiff also told them about the defective door.

Plaintiff said he did. Defendant's witnesses say he did not. The jury, who saw and heard the witnesses believed the plaintiff.

Comments on Reason No. 4 for Reversal:

As a final reason for reversal, the Appeals Court chose to label this cause as "one of those exceptional cases which call for a reversal." (Opinion P. 9) The implication seems to be that once a case is labeled "exceptional" it can become subject to special appellate retaliation not permissable in other cases. This case revolved around the simple disputed questions of negligence and nature and extent of plaintiff's injuries. The jury resolved these questions in favor of plaintiff. There was nothing "exceptional" about this case that justified supervisory appellate control over the jury's factual findings.

The type of cases where supervisory control of a verdict may be imposed are those where the "integrity" of the judicial process is at stake. This control has been exercised where *newly discovered evidence after verdict* "casts the darkest shadow upon the truthfulness of the disclosure testimony." *United States* v. *Shotwell*, 335 U.S. 234, 240; *Mesarosh* v. *United States*, 352 U.S. 1. In the case at bar there was no newly discovered evidence that sullied the jury's verdict. There was no occasion here to apply the salutary principles set out in the *Shotwell* and *Mesarosh* cases. This "exceptional case" reason adopted by the Appeals Court was wholly unjustified by the evidence.

II.

Although the Appeals Court reversed and remanded for a new trial, the effect of the Opinion is to enter judgment for defendant notwithstanding plaintiff's verdict.

The Appeals Court's Opinion states that it does "not hold as a matter of law that plaintiff's injury was not caused by the swinging door." (Opinion P. 8) If it had respected this Court's admonition in *Lavender* v. *Kurn* and related cases directing Appeals Courts not to invade the jurys historic fact finding function, the Appeals Court should have affirmed. Instead the Opinion proceeds to excoriate plaintiff's credibility and attack the jury's competence. It resolved all evidence in favor of defendant in such uncompromising language as to make any future plaintiff's verdict unable to survive defendant's motion for a new trial. The Appeals Court, in its Opinion, held that it was left "with a grave doubt as to the truthfulness and reasonableness of his (plaintiff's) trial testimony," that "there was a miscarriage of justice in this case," and that the verdict returned by the jury was "arbitrary and capricious" and "in total disregard of the evidence." (Opinion, pp. 8-9) Implicit in these remarks is a complete rejection by the Appeals Court of the jury's evaluation of the evidence.

The Appeals Court was informed by petitioner in his Petition for Rehearing that the trial testimony in petitioner's case would be exactly the same at any future trial. No action on this information was taken by the Appeals Court. Thus, the Opinion, as it now stands, gives defendant the luxury of repeated trials until such time as it can persuade a jury to return a verdict of not guilty. Moreover, the Opinion, as it now stands compels plaintiff to play

Russian Roulette with his legal rights until such time as he presses the trigger on the bullet of "Not Guilty."

Under the circumstances, how far removed is the effect of the remandment for a new trial from an order giving defendant judgment notwithstanding plaintiff's verdict?

CONCLUSION.

We feel that the Appeals Court has erroneously weighed the evidence and substituted its opinion for that of the trier of the facts. We feel that this Opinion will cast a cloud upon the opinions of this Honorable Court protecting the fact finding powers of a jury in Federal Employer's Liability cases.

Wherefore, petitioner respectfully prays that a Writ of Certiorari be issued out of this Honorable Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this cause, and for such other relief as to this Court may seem proper.

Respectfully submitted,

JOSEPH BARBERA,
One N. LaSalle Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

JOHN J. MILANO,
DOM J. RIZZI,
A. J. HARDIMAN,
Of Counsel.